No. 20193

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

COMPANIA NAVIERA DE BAJA CALIFORNIA, S. A., Appellant - Defendant and Third Party Plaintiff,	)
vs.	)
BERNARD A. NORIEGA, Appellee - Plaintiff,	)
vs.	)
CRESCENT WHARF & WAREHOUSE COMPANY, a corporation, Appellant - Third Party Defendant.	)

BRIEF OF APPELLANT

COMPANIA NAVIERA DE BAJA CALIFORNIA, S. A.

OVERTON, LYMAN & PRINCE,

Attorneys for COMPANIA NAVIERA DE BAJA CALIFORNIA, S. A.

SUBJECT INDEX

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I

STATEMENT OF THE CASE

1. Jurisdiction.

This is an appeal by defendant appellant COMPANIA NAVIERA DE BAJA CALIFORNIA, S.A. (hereinafter called "COMPANIA") from a final judgment in favor of plaintiff appellee BERNARD A. NORIEGA (hereinafter called "NORIEGA"). NORIEGA's cause of action for personal injury was based on the general maritime law and jurisdiction of the District Court was founded on 28 U.S.C. Section 1332. This court's jurisdiction arises under th provisions of 28 U.S.C. Section 1291.

2. The Proceeding Below.

a. The Material Pleadings.

NORIEGA filed his complaint (No. 63-679-S) seeking damages for personal injury allegedly occurring April 18, 1963, on board COMPANIA's vessel, the SS "SAN LUCIANO" (hereinafter called "vessel"). The alleged injury having occurred upon navigable waters (admitted Fact No. 7, p. 3, Pre-Trial Conference Order, R. 41), NORIEGA based his cause of action on the general maritime law, including negligence and breach of the warranty of seaworthiness. October 1, 1963, COMPANIA filed its answer (R. 7) denying the allegations of NORIEGA's complaint and setting up contributory negligence and assumption of risk as affirmative defenses.

On October 9, 1963, COMPANIA filed a third party complain (R. 12) against NORIEGA's employer CRESCENT WHARF & WAREHOUSE

COMPANY (hereinafter called "CRESCENT"). CRESCENT was COMPANIA's contract stevedoring firm loading the vessel at the time of the injury. COMPANIA, alleging CRESCENT was negligent and breached its warranty of workmanlike service, sought indemnity for any liability it might have to NORIEGA, plus reasonable attorneys' fees and costs incurred in defending against NORIEGA CRESCENT filed its answer (R. 22) November 6, 1963.

The case came on for trial without a jury on February 23, 1965, and the final judgment here appealed from was entered in favor of NORIEGA against COMPANIA on March 2, 1965 (R. 51). Of principal concern in the appeal of the judgment in favor of NORIEGA[1] is Findings of Fact Nos. 3 and 4 and Supplementary Findings Nos. 5, 6, 8 and 11, entered March 2, 1965 (R. 48) respecting the vessel's seaworthiness.

b. The Material Facts.

1. Summary.

The accident occurred aboard the "SAN LUCIANO", a Mexican freighter, at 11:20 A.M. on April 18, 1963 (Tr. p. 20). At about 8:00 A.M. CRESCENT, COMPANIA's contract stevedoring company, boarded the "SAN LUCIANO" for the purpose of loading pallets of bricks into the starboard side of No. 3 lower hold, known as the No. 3 starboard deep tank (Tr. p. 19).

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[1]CRESCENT is appealing the judgment entered against it in the third party action and the issues pertaining thereto will be briefed by COMPANIA in its reply to CRESCENT's opening brief.

CRESCENT, which had worked the ship on dozens of previous occasions, rigged the ship's gear and proceeded to load into the hold (Tr. p. 48). The hold had at one time been divided into a tween deck and a lower hold by means of strongbacks. The tween deck hatchcoaming was affixed with sockets which had formerly supported the strongbacks. These sockets were also referred to by the witnesses as strongback slots (Tr. pp. 51 and 52). The strongback sockets were inspected by CRESCENT and found to be secure and flush against the coaming at the onset of loading (Tr. pp. 52 and 53). During the course of the morning, three or four loads hung up on a strongback socket (Tr. p. 53). The loads were running close to 2100 lbs. (Tr. p. 55). As a consequence of the loads hanging up on a strongback socket, the socket started to open up and all loads commenced to hang up (Tr. p. 56). The longshoremen, at the direction of Mr. Hansen, the hatch boss for CRESCENT, stopped work (Tr. P. 58). The ship's crew then proceeded to hammer the bent flange of the socket back flush against the coaming (Tr. p. 59). CRESCENT's hatch boss stood by while crew members drove the flange flush against the coaming (Tr. p. 60). Prior to resumption of work the hatch boss made a personal inspection of the repaired flange (Tr. p. 61), ascertained that it looked perfect (Tr. p. 62) and upon checking it determined that the weld holding it had not broken (Tr. p. 62, Tr. p. 65, lines 12-17). The hatch tender for CRESCENT determined that the sledge hammering of the fitting had placed it back against the coaming in the same position as

when work had commenced that morning (Tr. p. 83). After making an inspection of the socket, CRESCENT resumed loading (Tr. p. 64, line 22 - p. 65, line 2) and continued for the next thirty minutes or so without incident (Tr. p. 66, lines 21-23), when CRESCENT negligently allowed a load of bricks to rub and chafe the socket (Tr. p. 84, lines 1-11), this time tearing a piece loose which struck the plaintiff.

2. The Findings.

Finding No. 3 states that the metal flange "at the time of the accident was protruding into the working area" (emphasis supplied). Finding No. 4 states that by reason of the protrusion the "SAN LUCIANO" was unseaworthy. It is apparent from the evidence and Supplemental Finding No. 8 that this protrusion and unseaworthiness were created instantaneously with the accident.

Supplemental Finding No. 5 indicates that prior to the accident the metal flange was bent "outward" by CRESCENT's allowing "the pallet or pallet bridle gear to catch or strike /said/ metal flange". However, this condition was fixed prior to the accident.

Supplemental Finding No. 6 states:

> "Thereafter /after the initial bending out/, crew members of the ship pounded the bent flange back flush against the coaming to its original position."

Supplemental Finding No. 8 states:

> "On completion of the pounding referred to above,

the flange was then flush against the coaming and in the identical position it had been in at the commencement of said loading operation."

The Finding goes on to state:

". . . thereafter the hatch tender . . . recommenced loading . . . . Shortly thereafter . . . the loading gear struck or caught said flange causing a part of it to break off and fall and strike plaintiff. . . ." (Emphasis supplied.)

Supplemental Finding No. 11 states:

"CRESCENT was negligent and breached its duty to render its stevedoring services in a workmanlike manner by causing or permitting the loading gear to strike or catch on said flange. . . ."

3. The Testimony.

Supplemental Finding Nos. 5, 6, 8 and 11 are supported by the following testimony.

HANSEN, the hatchtender for CRESCENT, testified as follows:

Tr. p. 51, line 25 to Tr. p. 52, line 17:

Q: Did you notice either on that occasion or any prior occasion a strongback at the site of the tween decks hatch?

A: Strongback slots.

Q: Strongback slots?

A: Yes, sir.

Q: And composed of double flanges, a flange on either side of the slot?

A: Flanges.

Q: Did you notice that when you came first on board that day and opened the hatch?

A: I knew they were there, yes.

Q: Did they appear to be in any different condition than they had been on prior occasions?

A: No, sir.

Q: Were both flanges before work started on that day flush against the coaming?

A: They were.

Tr. p. 53, lines 5-8:

Q: (By Mr. Larson): But at the time you commenced loading operations on the day in question they were both flush against the coaming?

A: They were.

Tr. p. 53, line 22 to Tr. p. 54, line 7:

Q: Prior to the time of the accident had anything hung up or caught on the flanges which were creating this socket, the strongback socket?

A: I would say about three or four loads did hang up.

Q: And what portion of the load was hanging up?

A: We were using twenty foot wire straps doubled

up, with say all four eyes on the blacksmith or the ship's hook, and as we lowered down and the eye right next to the blacksmith would catch the flange and the load would hang up partially and then it would give a jerk when it freed itself.

Tr. p. 56, lines 3-5:

Q: At any point did you notice that one of these flanges became bent out from the coaming?

A: I did.

Tr. p. 57, lines 1-4:

A: . . . The operation worked quite smoothly until the flange started to open, and as soon as the flange opened where the loads hung up I would say three times, I stopped the work.

Tr. p. 59, lines 1-4:

A: I knew the flange was there at all times, but as the loads hung up I went and took a check and stopped the work.

Q: To whom did you report after you stopped the work?

A: To the ship boss and the chief mate of the ship.

Tr. p. 59, lines 21-23:

Q: What did you do then?

A: We stayed there and the chief mate got one of the crew with a sledge hammer to go down and

knock it in flush.

Tr. p. 62, lines 2-5:

Q: Did you in any way test it to see whether the flange was in any way loosened or weakened by reason of the pounding?

A: Well, as far as the metal and anything was concerned, it looked perfect. (Emphasis added.)

Tr. p. 62, lines 9-17:

Q: Did you check to see whether it was loosened by reason of the pounding?

A: It was welded, I didn't see no reason why, welded and bolted.

THE COURT: Well, wouldn't it be necessary to break that weld to pound the flange back flush against the trunk?

A: Well, at the time I had checked it and there was no weld broke, sir, whatsoever.

Tr. p. 65, lines 12-22:

Q: Did you look to see when you were down there on your inspection whether or not any crack had appeared as a result of the pounding?

A: I did not notice any.

Q: Did you check for it?

A: I did, sir.

Q: Then, how many pallet loads were dropped into the hold after the pounding had been completed and

before the accident in question?

A: I would say we worked about thirty minutes or five or six loads.

Tr. p. 66, lines 21-23:

A: No. We had worked from 10:45 to 11:15 before the accident and the loads came in very smooth. There was no loads hanging up.

ON CROSS EXAMINATION

Tr. p. 73, line 25 to Tr. p. 74, line 4:

Q: Now, after the men had worked on this, or the man with this sledge hammer and you looked at it then, at that time before the men started back to work did it appear to you to be safe?

A: Definitely, sir.

HARVEY L. CRUMBY Testified:

Tr. p. 80, lines 12-16:

Q: (By MR. LARSON) Did you observe after the flange was pounded back, did you go down and take a look at it at all?

A: No, I never went below deck. From where we were you can see it quite plainly, and the top portion of it was back in against the coaming.

Tr. p. 81, lines 15-19:

Q: And was the load or the bridle resting and putting any strain that you could observe on the flange?

A: No, not after it was pounded in. It puts

pressure on it naturally if it touches it, but it didn't hang up, I'll put it that way.

ON CROSS EXAMINATION

Tr. p. 83, lines 16-25:

Q: Now, after this repairing or the hammering of this by the crew did it appear to you to be safe?

A: Well, it was back in against the coaming, the same as it was when we began, yes.

THE COURT: You say it was back against the coaming the way it was when you first came in there, is that what you said?

A: When we began to work, yes, in the morning.

THE COURT: That was eight o'clock?

A: Yes.

Tr. p. 84, lines 1-11:

Q: (By MR. SIKES) Is it true that there were a number of loads after it was fixed before the load in which Mr. Noriega got hurt, there were a number of loads that had been taken in without any incident at all, is that right.

A: Oh, yes, five or six loads.

Q: I wanted to make sure what I heard. As I understand, on this particular load when Mr. Noriega was hurt, this load had not hung up as the previous loads had, but it was simply the rubbing and chafing of the gear, is that correct?

A: That is correct, yes.

3. COMPANIA's Theory.

Finding No. 3 is "clearly erroneous" within the meaning of F.R.C.P. 52 in so far as it implies an existing condition prior to the accident. Striking Finding No. 3 and turning to the gist of Supplemental Findings Nos. 5, 6, 8 and 11 and the supportive testimony quoted above, it is clear that:

a. Prior to the negligence which caused the injury no "antecedent condition"[1] existed since any condition which had existed (the bent flange) had been corrected. The injury was caused by the negligent acts of fellow longshoremen at the very moment of injury; and

b. This was "instantaneous unseaworthiness"[2] which this Court has declared does not result in liability of the ship.[3]

4. The Applicable Law.

NORIEGA's basis of recovery is the doctrine of unseaworthiness enunciated in Seas Shipping Co. v. Sieracki, 328 U.S. 85; 66 S.Ct. 872; 90 L.Ed. 1099 (1946). The Court below[4]

[1] Beeler v. Alaska Aggregate Corp., 336 F. 2d 108 (9 Cir. 1964); Titus v. Santorini, 258 F. 2d 352 (9 Cir. 1958).

[2] Massa v. C. A. Venezuelan Navigacion, 209 F. Supp. 404 (E.D.N.Y 1962); Blassingill v. Waterman S.S. Corp., 336 F. 2d 367 (9 Cir. 1964).

[3] Billeci v. U. S., 298 F. 2d 703 (9 Cir. 1962).

[4] Tr. p. 113, lines 2-6.

also relied on Blassingill v. Waterman S.S. Corp., 336 F. 2d 367 (9 Cir. 1964) which stated in dicta that unseaworthiness may result if the stevedoring company adopts an unsafe method of loading cargo (Tr. pp. 113, 114-115) and Crumady v. Joachim Hendrik Fisser, 358 U.S. 423, 3 L.Ed. 2d 413 (1959) which held an unseaworthy condition can be "brought into play" by the stevedore's negligence.

COMPANIA contends that neither Seas Shipping Co. v. Sieracki, 328 U.S. 85; 66 S.Ct. 872; 90 L.Ed. 1099 (1946); Blassingill v. Waterman S.S. Corp., 336 F. 2d 367 (9 Cir. 1964); nor Crumady v. Joachim Hendrik Fisser, 358 U.S. 423, 3 L.Ed. 2d 413 (1959) apply to this case but that this is a case of "instantaneous unseaworthiness" within the meaning of Beeler v. Alaska Aggregate Corp., 336 F. 2d 108 (9 Cir. 1964); Rawson v. Calmar S.S. Corp., 304 F. 2d 202 (9 Cir. 1962); Titus v. Santorini, 258 F. 2d 352 (9 Cir. 1958); Billeci v. U. S., 298 F. 2d 703 (9 Cir. 1962); Manhat v. U. S., 220 F. 2d 143 (2 Cir. 1954); Sullivan v. U. S., 203 F. Supp. 496 (S.D.N.Y. 1961); Ventre v. Oetker, 214 F. Supp. 659 (E.D.N.Y. 1963); Massa v. C. A. Venezuelan Navigacion, 209 F. Supp. 404 (E.D.N.Y. 1962) for which the vessel is not liable.

II

SPECIFICATION OF ERRORS

1

The court erred in that portion of Finding of Fact No. 3 which states:

". . . said metal flange . . . at the time of the accident was protruding into the working area. . ."

except in so far as the court was describing a condition which existed at the moment of the accident.

2

The court erred in Findings of Fact Nos. 4 and 5, Supplemental Finding of Fact No. 11, Conclusion of Law No. 2 and Supplemental Conclusions of Law Nos. 2 and 3 by failing to find and conclude that the unseaworthiness of the SS "SAN LUCIANO" was instantaneous with plaintiff's injury.

3

The court erred in that portion of Conclusion of Law No. 3 which states:

"Plaintiff is entitled to a decree against the defendant Compania Naviera De Baja California, S.A., ..."

4

The court erred in ruling this case was controlled by

Seas Shipping Co. v. Sieracki, 328 U.S. 85, 90 L.Ed. 1099, (1946) Blassingill v. Waterman S.S. Corp., 336 F. 2d 367 (9 Cir. 1964) and/or Crumady v. Joachim Hendrik Fisser, 358 U.S. 423, 3 L.Ed. 2d 413 (1959).

III

ARGUMENT

1. Summary.

A. Finding that the flange protrusion was a precedent condition to the accident, is clearly erroneous and must be set aside.

B. There being no unsafe "antecedent condition", the injury was caused solely by the negligence of CRESCENT at the very moment of injury.

C. A vessel is not liable for negligence of the stevedore in the use of a seaworthy appliance at the very moment of injury.

D. The method of loading was not improper within the Blassingill Rule.

2. Discussion.

A. Finding that the flange protrusion was a precedent condition to the accident, is clearly erroneous and must be set aside.

F.R.C.P. 52(a) provides in part:

". . . findings of fact shall not be set aside unless clearly erroneous. . . ."

The judicial interpretation of "clearly erroneous"

is set forth in U. S. v. U. S. Gypsum Co., 333 U.S. 364, 395; 92 L.Ed. 746, 766 (1948) as follows:

> "A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed."

See also:

> Barry v. Lawrence Warehouse Co., 190 F. 2d 433 (9 Cir. 1951);

Here, there is no evidence to support Finding No. 3. It is inconsistent and directly contrary with Supplemental Findings Nos. 5, 6 and 8. Obviously, "a mistake has been committed". See the portions of the transcript quoted above.

B. There being no unsafe "antecedent condition" the injury was caused solely by the negligence of CRESCENT at the very moment of injury.

Setting aside Finding No. 3 and turning to Supplemental Finding No. 11 leads to the inevitable conclusion that CRESCENT's negligence alone, at the very moment of injury, was the sole cause of NORIEGA's injury.[5]

C. A vessel is not liable for negligence of the stevedore in the use of a seaworthy appliance at the very

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[5] That the injury was not caused by an "improper method of loading" is discussed in part D below.

moment of injury.

1. Herein of "instant unseaworthiness".[6]

The Ninth Circuit has recently enunciated the rule applicable hereto:

> "Liability on the ground of unseaworthiness does not attach if the injury was sustained by the negligent use of a seaworthy appliance at the very moment of injury. It does attach if the negligent act has terminated and an appliance has been left in an unsafe condition."[7] Beeler v. Alaska Aggregate Corp., 336 F. 2d 108 (9 Cir. 1964).

Other cases exemplary of the rule are as follows:

In Titus v. Santorini, 258 F. 2d 352 (9 Cir. 1958), Titus slipped and was injured when avoiding a loose load caused by a broken preventer wire and rope guy. The lower court found the vessel seaworthy. The Ninth Circuit, in affirming, discussed the several possible causes of the breaking of the

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[6] A term used in Blassingill v. Waterman S.S. Corp., 336 F. 2d 367 (9 Cir. 1964) to describe Titus v. Santorini, 258 F. 2d 352 (9 Cir. 1958) and Billeci v. U. S., 298 F. 2d 703 (9 Cir. 1962).

[7] Cf. the language of Beeler, supra, "left in an unsafe condition" and "antecedent conition"; with Titus, supra, "a pre-existing condition".

preventer wire and rope guy. Among these the third category was:

> ". . . the possibility that the winch was improperly operated or the loading was improperly done by a fellow longshoreman at the instant when the breaking occurred.
>
> . . .
>
> /I_/f the causation of the break was in this third category, negligence at the moment of a fellow longshoreman, the ship would not be liable."

At page 354:

> "This Court is not convinced that the instantaneous acts of a fellow longshoreman rendering the equipment unseaworthy and injury to the longshoreman are chargeable to the ship as unseaworthiness."

The Ninth Circuit continued at page 355:

> "It may be that the Supreme Court decisions will reach the point where the shipowner is liable for unseaworthiness based on the very act of a fellow longshoreman which causes the injury, but it does not appear that the Supreme Court has gone that far. It would seem that unseaworthiness must be a pre-existing condition."[8] (Emphasis added.)

In a footnote, the court states:

> "This concept is very clearly expressed by Circuit

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[8] See footnote 7.

Judge Learned Hand at page 922 of the Grillia decision." Grillia v. U. S., 232 F. 2d 919 (2 Cir. 1956).

The statement of Judge Hand referred to is:

". . . when a strongback is dislodged by the negligence of a winchman, or of those who direct him, or when some one of the crew carelessly turns a lever that drops a boat from its davits, there is a moment, however, short during which the ship is unfit and during which her unfitness causes the injury; yet on such occasions she is not deemed unseaworthy." (Emphasis added.)

In Billeci v. U. S., 298 F. 2d 703 (9 Cir. 1962), Billeci was injured when a winch with safety pin not in place fell out of gear, causing the load to fall on his foot. The winch was seaworthy and the Ninth Circuit said at pages 705-706:

". . . the owner's warranty of seaworthiness does not extend to a negligent use by longshoreman of seaworthy appliances."

"This is not a case where the negligent act had terminated and an appliance was left in an unsafe condition." (Emphasis added.)

"Plaintiff's injury was sustained by the negligent use of a seaworthy appliance at the very moment of injury." (Emphasis added.)

See also:

Manhat v. U. S., 220 F. 2d 143 (2 Cir. 1954).

In Freitas v. Pacific-Atlantic S.S. Co., 218 F. 2d

562 (9 Cir. 1955), the Ninth Circuit affirmed the lower court's dismissal on the theory there was no evidence of unseaworthiness. The facts were summarized as follows, at page 563:

> "A scow flat containing two handcars for use in a cargo removal had been lowered into the hold and had been pushed forward by the stevedores out of their way into the covered portion of the hold. The injury occurred after appellant and his work partner had attached four cables to the scow, which with the handcars aboard was to be lifted from the lower 'tween deck through the two partially uncovered hatches to the main deck. Because the scow flat was under the portion of the shelter deck hatch which had not been uncovered, the winch pulled it up at an angle; and as a result the shackle connecting the four cables to the hook caught against the lower side of the middle strongback of the shelter deck hatch. The winch operator failed to perceive the hooked condition until the strongback had been pulled from its supporting slots. The strongback and the hatch boards which it had been supporting fell to the lower 'tween deck, and one of the hatch boards struck appellant in the back."

In Freitas, the load, while being raised, caught under the strongback dislodging it. Here, the load, while being lowered, caught a strongback flange, dislodging it. COMPANIA places heavy reliance on Freitas. The observation

pertinent in Freitas is relevant here:

> "/T/he accident in this instance was directly brought about by an improper, if not foolhardy, use of the ship's gear. . . . There was no showing that if a locked strongback/in NORIEGA's case, a flange/ is in a seaworthy condition it can not be dislodged by the force improperly and unnecessarily applied to it here. Nor, conversely, was there evidence that the winches were incapable of generating sufficient pressure to dislodge a locked strongback in a seaworthy condition." Freitas v. Pacific- Atlantic S.S. Co., 218 F. 2d 562, at 564 (9 Cir. 1955).

The lower court's error in the instant case is best revealed in the following verbal exchange:

> MR. LARSON:
>
> ". . . it was the flange which broke off in the course of the cargo loading and struck the plaintiff."
>
> THE COURT: "Well, I think that establishes a prima facie case." (Tr. p. 3.)

To the contrary, the above cases indicate that a pre-existing unsafe condition must be proven. Here, the flange was in perfect condition prior to the injury. Hence, the vessel was not unseaworthy.

D. The method of loading was not improper within the

Blassingill Rule.

THE RULE OF BLASSINGILL

Although the findings below are silent as to whether or not CRESCENT chose to employ a dangerous method of loading, the trial judge in his remarks from the bench after the trial stated:

> ". . . it is the Court's opinion that . . . /the stevedore/ chose to employ a dangerous method within the meaning of Blassingill . . . ."[9] (Tr. p. 113, lines 2-6).

In Blassingill, supra, at page 369 the Ninth Circuit attributed the Supreme Court with having recognized in a dictum[10] that unseaworthiness can result from an improper method of loading.

Blassingill also notes that the Supreme Court's dictum "is fully supported by the decisions of the lower federal courts..." 336 F. 2d 367, 369. Before reviewing Blassingill COMPANIA

[9] The trial court also cited Crumady v. Joachim Hendrik Fisser, 358 U.S. 423, 3 L.Ed. 2d 413 (1959) which this court has described as "not one of defective equipment but of an improper method of using it." Blassingill v. Waterman S.S. Corp., 336 F. 2d 367, 370 (9 Cir. 1964).

[10] Morales v. Galveston, 370 U.S. 165, 170, 8 L.Ed. 2d 412, 416 (1962): ". . . a vessel's unseaworthiness might arise from any number of individualized circumstances. . . . Her method of loading her cargo . . . might be improper. . . ."

stresses that the trial court, having cited Blassingill, supra, and Crumady, supra, fortifies COMPANIA's contention heretofore made that the flange was not defective since neither are "defective equipment cases".

The pivotal question in this case is whether the activity of CRESCENT which caused NORIEGA's injury was negligence with respect to the particular load,[11] or whether the injury was caused by an "unsafe method of loading". An alternative description of the latter liability producing category is whether ". . . there was adopted by . . . /CRESCENT/ a course of conduct that made the ship dangerous". Blassingill v. Waterman S.S. Corp., 336 F. 2d 367, 370 (9 Cir. 1964).

The trial court in Blassingill had refused to submit instructions to the jury to the effect the vessel is unseaworthy if the jury found the stevedore had adopted an unsafe method of unloading cargo.[12] The refusal to give the instruction was error under the rule announced in Wong v. Swier,

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[11] The court in Blassingill, supra, observed that ". . . Blassingill might fail in this case if the only danger was brought about by himself or his fellow longshoremen in not properly placing bales in the particular sling load that injured him" (p. 370). (Emphasis added.)

[12] In Blassingill, supra, the alleged unsafe method was placing four bales of cotton in each load, making each load dangerous.

267 F. 2d 749, 761 (9 Cir. 1959) that a party "is entitled to have his theory of the case presented to the jury by proper instructions if there is any evidence to support it." The case was, therefore, reversed and remanded for a new trial on the unseaworthiness count. The jury on the retrial in Blassingill was faced with the same question as the Ninth Circuit is faced with here, viz, whether this is a case of negligence with respect to a particular load or whether an "unsafe method" or dangerous "course of conduct" is involved. The findings of the court below put this case into the first category. COMPANIA agrees with the findings and contends that Blassingill does not apply.

First of all, Blassingill uses the words "method" and "course of conduct". These words imply a series of actions, repeated over and over. In Blassingill the stevedore had been putting four bales of cotton in each sling and the court stated only a two bale load was safe. In the NORIEGA case the only unsafe load was the one injuring NORIEGA wherein the bridle was allowed to chafe or catch on the hatch coaming flange. That particular load was handled negligently. The method was safe so long as executed carefully. The method entailed lowering the loads so as not to allow the bridle gear to chafe. For that reason Blassingill does not apply.

IV

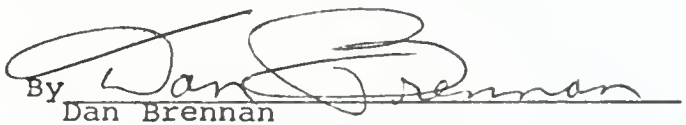
CONCLUSION

On conclusion COMPANIA submits that the judgment in

favor of the plaintiff should be reversed.

Dated: September 9, 1965.

OVERTON, LYMAN & PRINCE
DAN BRENNAN
JEROME O. HUGHEY

By 
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DE BAJA CALIFORNIA, S.A.

APPENDIX

Exhibits	Marked For Identification	Admitted In Evidence
Plaintiff's 1	5	45
Plaintiff's 2A, 2B, 2C	47	47
Defendants' A and B		45
Defendants' C	24	45
Defendants' D through G		45
Defendants' H	38	45

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

Dan Brennan